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IN THE

Supreme Court of the United States

October Term, 1963

No. 353

IVAN MRVICA,

Petitioner,

—v.—

P. A. ESPERDY, District Director, Immigration & Naturalization Service,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the Court of Appeals (R. 11-14)[1] is reported in 317 F. 2d 220. The opinion of the District Court (R. 6-8) is reported in 202 F. Supp. 214.

Jurisdiction

The judgment of the Court of Appeals was entered May 14, 1963 (R. 14). A petition for a writ of certiorari was filed August 8, 1963 and was granted October 28, 1963 (R. 15). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

[1] Page references are to the Transcript of Record unless otherwise indicated.

Question Presented

Whether a brief physical absence from the United States constitutes a break in the continuous residence required for relief under §249, Immigration and Nationality Act, solely because at the time of departure an order of deportation was pending against the alien.

Statutes Involved

The statutory provision involved is §249 of the Immigration and Nationality Act (8 U. S. C. 1259) as interpreted within the framework of §§101(a)(33) and 101(g) of the Immigration and Nationality Act (8 U. S. C. 1101(a)(33) and 1101(g)). The text of these sections is reproduced in the Appendix, *infra*, pp. 22-23.[1]

Statement of Case

The facts in the case are not at issue. The petitioner applied for permanent residence under §249. His application was denied by the respondent on the ground that, although he entered the United States prior to June 28, 1940 as required by §249(a), an interruption of his physical presence in the United States in 1942, because he left under an order of deportation, constituted a break in the required "continuous residence within the United States (Matter of P—, Interim Decision 976)" (R. 9-10). The United States District Court for the Southern District of New York agreed with this finding (R. 6-8) and was affirmed by the Court of Appeals for the Second Circuit (R. 11-14).

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[1] References hereafter will be to sections of the Immigration and Nationality Act unless otherwise indicated.

Petitioner, a citizen of Yugoslavia, now 58 years old, was born December 17, 1906 in Zirje, Dalmatia, at the time when that area was part of Austria-Hungary. Following World War I, his birthplace became part of Italy, and after World War II it became part of Yugoslavia. He left his birthplace in 1939 and has not been back since it came under the jurisdiction of the Yugoslav government. He entered the United States on January 21, 1940 on a crewman's permit and has resided in the United States since that time.

In September 1942, when World War II was at its height, petitioner underwent deportation proceedings and was ordered deported as an overstayed crewman. At that time, the sea route to Europe was barred to ordinary traffic and deportation to Yugoslavia was impossible. On the other hand, the United States was in need of able-bodied men, and persons such as the petitioner were encouraged to ship out with the understanding that they would be readmitted upon return from their voyage. The petitioner consented to do this and was granted a waiver under the Ninth Proviso of §3 of the Act of February 5, 1917 for reentry into the United States as a crewman, without special permission of the Attorney General.[3]

He took one round trip to South America on the SS Dubrovska, the trip lasting from October 6 to December 19, 1942. By this departure, the petitioner executed the outstanding order of deportation.[4] When the ship returned

[3] The text of the Ninth Proviso follows:

". . . *Provided further* (9) That the Commissioner of Immigration and Naturalization with the approval of the Attorney General shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission. . . ."

[4] §101(g), 8 U. S. C. 1101(g); for text see Appendix p. 23.

from its voyage, the petitioner Mrvica, reentered the United States without difficulty by reason of the permission granted him prior to sailing. There is no evidence in the record that petitioner's "residence in fact" in the United States was interrupted by his short absence. He had registered for the draft in 1940 and had maintained all his ties in the United States, including his bank account and his Union membership. All parties involved, including the Immigration and Naturalization Service, were aware of the fact that he would return to the United States with the same ship, since he had no travel documents which would have facilitated his landing in any other country.

Except for his absence in 1942, the petitioner has not been outside the United States since he first entered in 1940. During the period from 1942 to 1952 no new proceedings were initiated against the petitioner whose presence in the United States, of course, was known to the Service. He was again placed under deportation in 1952, but has been permitted to remain in the United States in connection with his various attempts to adjust his status.[5]

[5] From 1952 to 1956 the petitioner, who is opposed to the present regime in Yugoslavia, attempted to adjust his immigration status, but was unsuccessful in various efforts to do so. From 1956 to 1958 the Immigration and Naturalization Service granted a blanket stay of deportation to all Yugoslavs who under §243(h) (8 U. S. C. 1253(h)) asserted that, if deported to Yugoslavia, they would be subject to physical persecution because of their religious beliefs or political opinions. When in 1958 the Immigration and Naturalization Service resumed deportations to Yugoslavia, the petitioner applied for a refugee visa under P. L. 85-316, a special statute, then in effect. His application was rejected on the ground that he had entered the United States as a crewman. He received an administrative stay in connection with another action, questioning the propriety of such rejection. That action, *Dombrovskis et al.* v. *Esperdy*, was dismissed by the Court of Appeals August 7, 1963, 321 F. 2d 463 (2d Cir. 1963).

Summary of Argument

Petitioner respectfully contends:

The Court of Appeals erred in finding that petitioner's departure under an order of deportation interrupted his continuous residence in the United States and that the grant of Ninth Proviso relief was irrelevant.

Petitioner submits that §249 of the Immigration and Nationality Act, as amended, was meant to create a statute of limitations for long-term residents in illegal status who have shown themselves persons of good moral character, and that the 1958 amendment of the law, by eliminating deportability as a bar to such relief, clearly authorized registry in cases such as that of the petitioner.

The fact that Ninth Proviso relief was granted by the Immigration and Naturalization Service is evidence of the *objective* fact that petitioner had not interrupted his residence during his brief absence from the country.

ARGUMENT

The petitioner has resided in the United States continuously since prior to June 28, 1940.

The issue before the Court is one of statutory construction, namely, whether the facts which are stated above and which are not controverted, fulfill the requirement of §249 (b), that the petitioner has resided in the United States *continuously* since prior to June 28, 1940.

The Immigration and Nationality Act defines "residence" as follows:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, *without regard to*

intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States." (Emphasis supplied.)[6]

It should be noted that not only in this definition, but also in other portions of the Immigration and Nationality Act a deliberate distinction is made between the concept of "residence" and that of "physical presence".

Section 249, which merely requires "residence" is thus distinguishable from "suspension of deportation",[7] another adjustment of status provision which explicitly requires "physical presence," and §316, Immigration and Nationality Act, a naturalization provision which requires both.[8] The distinction between "continuous residence" and "physical presence" is new in the Immigration and Nationality Act. The term "physical presence" is comparatively unambiguous and is not further defined by statute.

"Residence" on the other hand was defined by the Immigration and Nationality Act because in the past it has been the subject of countless court interpretations, the majority of which consider establishment of residence dependent on subjective intent.[9]

The Immigration and Nationality Act explicitly removes the element of "intent" from its definition of "residence".

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[6] §101(a)(33) INA; 8 U. S. C. 1101(a)(33).

[7] §244 INA; 8 U. S. C. 1254.

[8] 8 U. S. C. 1427.

[9] For a general discussion of the term "residence" see Reese and Green, "That Elusive Word 'Residence,'" 6 Vand. L. Rev. 561 (1953). It was described as "a single term of broad and ill defined content, having no exact legal meaning." by Goodrich *J.* in *United States* v. *Stabler*, 169 F. 2d 995, at 998 (3rd Cir. 1948).

The congressional intent presumably was to place into statutory language the ruling of the United States Supreme Court in *Savorgnan* v. *United States*, 338 U. S. 491 (1949). In that case the petitioner's citizenship depended on whether, in the period from 1941 to 1945 she had her residence in Italy, where she was physically, or in the United States, where she had lived before that time. Her position was, that she had been in Italy only temporarily and not with the *intention* of establishing a "permanent residence," and that she had always intended to retain her permanent residence in the United States. The United States Supreme Court, in discussing this contention states, at pp. 504-505:

> "The petitioner's residence abroad met the requirements of the Act of 1940. Sec. 403(a) and 104 used the terms 'residence' and 'place of general abode' without mention of the intent of the person concerned. The act cleared up the uncertainties which had been left by early decisions as to the type and amount, if any, of residence abroad that was required to establish expatriation. In contrast to such terms as: 'temporary residence,' 'domicile,' 'removal, with his family and effects,' 'absolute removal' or 'permanent residence,' the new Act used the term 'residence' as plainly as possible to denote an objective fact. To identify the required 'place of residence,' it required only that it be the 'place of general abode.' . . ." [10]

The Court referring to the legislative history of the statute involved, concluded that it was irrelevant whether Mrs. Savorgnan *intended* to establish residence in Italy or *intended* to maintain a permanent residence in the United

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[10] Footnotes omitted. One footnote points out that where "permanent residence" was intended, the statute used the term. (It might be suggested that where "lawful" residence or "physical presence" is intended the statute also uses the appropriate terms.)

States. Her "place of general abode" for four years had been Italy and that objective fact was decisive for determination of her residence.

It is submitted that by this reasoning which has been codified in the definition of residence in §101(a)(33), petitioner's "place of general abode" was the United States ever since January 1940 and neither *his* intention, nor that of the respondent could change that *objective* fact. During the petitioner's brief absence all parties involved knew that as a matter of objective fact, he resided in the United States and by necessity would return to this "place of general abode." [11]

The Immigration and Naturalization Service has recognized that the residence requirement of §249 is not identical with uninterrupted physical presence.

In Matter of P—, Interim Decision 976,[12] the very decision which was the basis for the denial of the petitioner's application (R. 9), the Assistant Commissioner for Immigration approved the decision made by a Regional Commissioner that,

> ". . . An alien who has been absent from the United States at any time since the entry upon which his application is based may be found to have resided continuously in the United States since the date of his original entry if his absence was temporary and his principal

[11] For a comprehensive discussion on the concept of "continuous residence", albeit, in connection with loss of citizenship, see 53 Colum. L. Rev. (1953), L. Gordon, *Loss of Citizenship by Continuous Residence Abroad*, 451-475, where the interpretation most often given to the term "residence" is the country where a person "was physically present a majority of the time, and, if he was not present that long in any one country, then the country in which he was present for the longest period" (p. 459).

[12] Published 8 I. and N. Dec. 167-169.

actual dwelling place in fact remained in the United States during the entire period of his absence" (at p. 169).

The same opinion however states that "a departure from the United States as a result of exclusion or expulsion proceedings breaks the continuity of residence for the purpose of §249, regardless of the period of time the alien is outside the United States after such departure," (*ibid.*). No precedent is cited, or other reason given for the distinction. The Courts below affirmed this ruling. See also *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292 (N. D. Cal. 1960), affirmed per curiam, 287 F. 2d 561 (C. A. 9, 1961); *Lum Chong* v. *Esperdy*, 191 F. Supp. 935 (S. D. N. Y. 1961), both of which are distinguishable on the facts to the extent that in both cases the aliens left the United States at the conclusion of the war, when deportation was a practical possibility, so that their return was not as inevitable as that of the petitioner. In one of the cases, there was no advance permission to return.

The Court below, referring to the petitioner's situation, conceded that it is difficult to believe "that a merchant ship at sea in a time of worldwide naval war is . . . to be considered in retrospect as having been a 'place of general abode'" (R. 13). However, taking into consideration §101(g)[13] which provides that any alien ordered deported, who has departed from the United States, has thereby executed the deportation order, the Court concluded that petitioner's departure under such circumstances did interrupt his residence.

It is respectfully submitted that this conclusion is erroneous and that it intermingles two factual terms, namely, "physical presence" and "residence in fact" with a purely

[13] 8 U. S. C. §1101(g), for text see Appendix, p. 23.

legal and really a fictitious term, namely, the "execution of a deportation order." There might be justification in the position if Congress had not explicitly removed the element of subjective intent from the concept of "residence". It should be impossible for an alien to retain his residence in the United States by reserving the *intention* of retaining his residence while being deported, thereby mentally clinging to a residence to which as a matter of law he is not entitled. But Congress reduced the issue to a purely factual one, and §101(g) notwithstanding, the facts in existence at the time when the events in question took place, made it impossible for either the petitioner or the respondent to interrupt the petitioner's residence "in fact." The petitioner had one place of general abode only, namely the United States. This result is entirely in keeping with the humanitarian purpose of §249 and its legislative history.

Historical Background

The institution of "registry" originated with the Act of March 2, 1929 (45 Stat. 1512). It applied to aliens who had arrived before the temporary quota law of June 3, 1921 and permitted creation of a record of lawful entry for permanent residence on behalf of those who could meet certain prescribed conditions. Its purpose was to legalize the residence of aliens who had entered improperly before that date, but whose deportation was precluded by the statute of limitations then in effect.[14] The registry statute was codified in the Nationality Act of 1940. The only significant change was to advance the controlling date to July 1, 1924, the

[14] For discussion of legislative history, see Bernsen, Acquisition of Lawful Permanent Residence, 8 I & N Reporter, 3 (1959); Gordon and Rosenfield, "Immigration Law and Procedure," Banks & Co. (1959) and Supplements, 735-736. Also Codification of the Nationality Laws, House Committee Print, 76th Cong., 1st Sess. (1939), p. 41.

effective date of the basic quota law. The 1952 Act retained the registry provision of the 1940 Act. A person subject to deportation was not entitled to registration under that provision.[15]

A revision of significance for the petitioner, who prior to that date clearly was not covered by the statute, occurred in 1958.[16] The cut-off date for eligible aliens was advanced to June 28, 1940 (the effective date of the Alien Registration Act of 1940, 54 Stat. 670). The more significant change, however, was that the amendment eliminated the disqualification heretofore existent, of persons who are deportable. This statutory change made the benefits of the statute available to persons of good moral character, even though they were deportable, provided that they are not inadmissible as criminals, subversives or other undesirables.

A situation, such as that now before the Court, was not mentioned in the legislative history of the provision, but a comparative reading of §249 as enacted in 1952 and its 1958 amendment shows that the interpretation urged upon this Court would clearly fulfill the humanitarian purpose of the amendment.

Immigration & Nationality Act of 1952	*Immigration & Nationality Act as Amended by Act of August 8, 1958*
Sec. 249(a). A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, if	(a) A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, *as of*

[15] §328(b), Nationality Act of 1940 (54 Stat. 1152); §249(a)(4) (1952).

[16] Act of August 8, 1958 (72 Stat. 546).

Immigration & Nationality Act of 1952	*Immigration & Nationality Act as Amended by Act of August 8, 1958*
no such record is otherwise available and such alien shall notify the Attorney General that he—	*the date of approval of his application, or, if entry occurred prior to July 1, 1924, as of the date of such entry,* if no such record is otherwise available and such alien shall satisfy the Attorney General that he *is not inadmissible under section 212 (a), insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—*[17]
(1) entered the United States prior to July 1, 1924;	(1) entered the United States prior to *June 28, 1940;*
(2) has had his residence in the United States continuously since such entry;	(2) has had his residence in the United States continuously since such entry;
(3) is a person of good moral character;	(3) is a person of good moral character;
(4) *is not subject to deportation;*[17] and	
(5) is not ineligible to citizenship.	(4) is not ineligible to citizenship.

[17] Italicized portion in 1952 Act was deleted by amendment. Italicized portions in 1958 Act were added by amendment.

The effect of the deletion of §249(a)(4) from the 1952 Act was to create a statute of limitations for illegal entrants or overstays who have resided in the United States for many years and have proved themselves to be good members of their community. The legislature has indicated beyond doubt that illegality of status and deportability are not considered a disqualification under the provision.

Subsequent legislation should be considered in connection with the interpretation of prior legislation upon the same subject, *Great Northern Railroad Co.* v. *United States,* 315 U. S. 262, 86 L. Ed. 836. The reverse also is true, and the change in the law which deleted *clause* (4) above, must be considered of significance in the interpretation of the amended statute.

The government's brief in opposition to the petition for certiorari (p. 4 fn. 2) mentions an abortive attempt of the legislature in 1962 to amend §249 by moving the cut-off date from June 28, 1940 to December 24, 1952. Since petitioner does not claim to come within the scope of the law by reason of his 1942 entry, the injection of the point is irrelevant, but lest erroneous and adverse inferences be drawn from the language used in the government's brief, "that in 1962 Congress considered and rejected" such an amendment, and excluded former crewmen (such as this petitioner) from the substitute remedy, a brief legislative history of this development must be included in the brief in order to set the record straight.

Congressional history indicates that Congress did not have an opportunity "to consider and reject the amendment," which in fact was defeated in a legislative maneuver on the last day of the second session of the 87th Congress. The Congressional Record is replete with criticism of the method used in connection with the procedure followed to secure passage of this legislation.

The original proposal to move the cut-off date to December 24, 1952 was first introduced by the late Representative Francis E. Walter of Pennsylvania, then chairman of the House subcommittee on immigration and the acknowledged leader in the field of immigration legislation and sponsor of practically every successful legislative proposal dealing with amendments of the Immigration and Nationality Act of 1952, also known as the "Walter-McCarran Act." On May 24, 1962, he introduced *H.R. 11911*, a bill "to facilitate the entry of alien skilled specialists and certain relatives of United States citizens; and for other purposes."

The first *three* sections of the bill related to oversubscribed quotas. There was considerable political pressure brought to have vastly oversubscribed preference quotas changed to nonquotas because skilled specialists and close relatives of American citizens were waiting endlessly on the quota registration lists.

The *fourth* section of the bill was the proposed amendment of §249. The draft had been submitted to Congressman Walter by the Department of Justice, accompanied by a letter from the Attorney General urging that it be enacted.

On May 24, 1962, the bill, including Sec. 4 was reported favorably by Mr. Walter's "Subcommittee on Immigration and Nationality." There was no indication that Mr. Walter, the sponsor of the bill, was in any way opposed to its enactment. Controversy arose in Congress with regard to the first and second sections of the bill because they would, in their original form, have permitted immediate immigration of 65,000 aliens. Some of the legislators felt that this was too large a number, and *H.R. 11911* was stalled in the Committee on the Judiciary of the House. Yet, the

Immigration and Naturalization Service, with the consent of Congress, administratively recognized the probable enactment of Sec. 4, and in June, 1962 permitted publication of an administrative policy, that pending action on *H.R. 11911* no deportation orders pertaining to long-term resident aliens would be carried out.[18]

Almost simultaneously with *H.R. 11911*, an identical bill, *S. 3361* was introduced in the Senate. As action was stalled in the House, the Senate Committee on the Judiciary, on October 4, 1962 at the end of the session, reported the bill favorably. In its report, accompanying the bill, the Committee stated:

> "*Section 4* of the bill, as amended, would amend section 249 of the Immigration and Nationality Act, as amended (66 Stat. 219), to permit the creation of a record of lawful admission for permanent residence in the cases of certain aliens who entered the United States prior to December 24, 1952. Under existing law such an adjustment may be made in the cases of certain aliens who entered the United States prior to June 28, 1940." [19]

Included in the report was a memorandum from the Department of Justice, which, among other things, contained the following information:

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[18] *Interpreter Releases*, Vol. 39, No. 23, "Important News for Long-Term Alien Residents," June 7, 1962, p. 172. The entire legislative history of the provision, taken from the *Congressional Record* and reports of Congressional committees, was traced in *Interpreter Releases*, an Information Service on Immigration, Naturalization, and Related Problems, Vol. 39, No. 25, June 29, 1962, pp. 177-188; No. 34, August 29, 1962, pp. 230-235; No. 42, October 29, 1962, pp. 280-286, published by the American Council for Nationalities Service, and edited by Counsel for petitioner.

[19] *Senate Rept. No. 2276*, 87th Cong. 2nd Sess. (1962) to accompany *S. 3361*, p. 2.

"At the present time, Chinese and other aliens chargeable to heavily oversubscribed quotas who entered subsequent to June 28, 1940, are in large part statutorily ineligible for relief from deportation, notwithstanding that deportability is based upon grounds which do not reflect adversely upon their moral character or desirability as permanent residents. Adoption of a proposed amendment to section 249 of the Immigration and Nationality Act to move the cutoff date forward to December 24, 1952, the effective date of that act, would permit adjustment and eventual naturalization to otherwise eligible residents whose conduct over the years has demonstrated their desirability as residents" (Rept., p. 5).

The Senate one day later passed *S. 3361*, on the consent calendar, including its Sec. 4, in the original form. Several of the Senators expressed their regret that the bill was not more generous, but because of the advanced date of the calendar and the fact that Congress was ready to go home, it was evident that if they would vote against the bill, because it was too narrow, no immigration bill would be passed at all.

On October 5, one day after the Senate had acted on *S. 3361*, Representative Walter asked unanimous consent of the House for immediate consideration of the bill, pointing out that Subcommittee No. 1 of the Committee on the Judiciary of the House—of which he was the chairman—had previously approved the bill.

In the brief floor discussion, Representative Moore asked that Sec. 4 be stricken because, according to him, it would "make it profitable to hide out for a prolonged period of time." [20]

[20] 108 Cong. Rec., 21417 (1962).

Representative Judd asked for an explanation of the term "hide out" used above, and Representative Walter stated:

> "Well, under the law, where an alien has been in the United States prior to June 28, 1940, and where upon application it is found that he is of good moral character and is not a criminal or subversive, then his status may be adjusted regardless of how long he has been in hiding.
>
> The other body (sic) changed that date from June 28, 1940 to December 24, 1952. We do not think that this should be done. We think it puts a premium on the ability to hide. If there are meritorious cases, then we feel we can deal with them adequately through existing suspension of deportation laws or through private legislation. As a matter of fact, I do not think there were more than 15 such cases brought to the attention of your committee under section 244(a)(4) of the immigration code, in this session." [21]

Mr. Walter failed to mention that he had originally introduced the provision and that his committee had recommended it favorably. The bill was amended as suggested, with a minimum quorum present. A number of congressmen who had been absent expressed dissatisfaction with the action. Representative Rooney of New York was particularly upset. He said:

> "Mr. Speaker, I have just now learned that during my absence within the hour in the old Supreme Court Chamber here in the Capitol presiding at a conference with conferees of the other body on the bill H.R. 12580 making appropriations for the Departments of State,

[21] 108 Cong. Rec., 21417.

Justice, and Commerce, the Judiciary, and related agencies for fiscal year 1963, the gentleman from Pennsylvania [Mr. Walter], called up the bill S. 3361. I now learn that this bill which was passed by the other body earlier today has now been passed in the House with two amendments: one, accepted by the gentleman from Pennsylvania striking out section 4 and the other offered by the gentleman from Pennsylvania creating a new Assistant Secretary of State.

I am utterly appalled at all this since the gentleman from Pennsylvania has continually assured me since the month of June 1962, that if the distinguished senior Senator from Rhode Island [Mr. Pastore], obtained passage of this bill in the other body that he, the gentleman from Pennsylvania and his committee would accept it. Instead of this bill, and I introduced a similar bill, H.R. 12369 on June 29, 1962, at the suggestion of the gentleman from Pennsylvania, being now on its way to the White House for signature, it has been amended contrary to the assurances given me many times since last June." [22]

With the floor amendments, the bill was returned to the Senate on the same day. The Senate disagreed with the House and a conference committee submitted a report to both Houses on October 13, 1962. Congress adjourned on Saturday, October 14, 1962, so that neither House had a representative group present when the bill was finally passed on that date with a very complicated substitute Sec. 4, several pages long and consisting of a recodification of the suspension of deportation provision of the Immigration and Nationality Act. This substitute appeared for the

[22] 108 Cong. Rec., No. 182, October 5, 1962, 21418 (1962). Representative Rooney at a later date had the above-quoted passage expunged from the Congressional Record.

first time in the conference report and thus had not been before the Committees on the Judiciary of either House.

As stated before, the preceding legislative history is irrelevant to petitioner's claim, but was inserted in the brief because the failure of the amendment should not be construed as an expression of Congressional intent with regard to the law as it presently exists.

Significance of *Rosenberg* v. *Fleuti*

Although there is no direct Supreme Court precedent for the petitioner's case, the recent decision in *Rosenberg* v. *Fleuti*, 374 U. S. 449 (1963) permits analogous reasoning. Even though *Rosenberg v. Fleuti* did not deal with the status of an alien who left the United States under a deportation order, *Fleuti*, in the opinion of the Service, became deportable because he was excludable once he reentered, and to that extent the two cases are interrelated.

The issue in the *Mrvica* case is a different one; it turns on the definition of "residence" while *Fleuti* addressed itself to the definition of "entry."[23] The Service has consistently ruled that continued physical presence is not one of the requirements of §249.

This Court in the *Fleuti* decision, however, stresses the fact that the concept of "continuous residence" has been liberalized by the 1952 Act. Under that decision, it may be argued that Mrvica did not even make a new entry when he returned with his ship in 1942. §249 does not make this necessary to bring him within the statute, but it would clinch the argument that the petitioner did not interrupt his residence in the United States at any time.

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[23] §101(a)(13) (8 U. S. C. 1101(a)(13)).

Significance of Advance Permission to Return

The fact that the petitioner received advance permission to return[21] was emphasized in the briefs for petitioner, not to establish that he reentered lawfully in 1942, but only to prove that he never interrupted his "residence in fact." Yet, the District Court, apparently misunderstanding the argument, not only rejected the grant of "advance permission to return" as irrelevant to the issue, but stated that even if it were to be considered, " . . . it only provided that the plaintiff be permitted shore leave in the future if he returned to this country as a *bona fide* seaman" (R. 8), but that plaintiff did not return "as a *bona fide* seaman," and therefore was not eligible for the benefits of the Ninth Proviso (*ibid.*). Again, the Court of Appeals, pointing to the 1942 entry states, that it was illegal and that to ignore such illegal reentry after the cut-off date, would amount to aggregating two illegal periods of residence to make one continuous period, a thought process, which the Court of Appeals believed was not within the scope of §249.

Although the "advance permission to return" was merely used as another element in the continuity of residence, in view of the fact that both the Court of Appeals and the District Court in this case commented on the illegality of the second entry, and the fact that the petitioner could have at a later date departed voluntarily, it should be stressed that §249 is considered to be available only in cases where there is no record of lawful entry, and that Congress enacted the law for the benefit of aliens illegally in the United States who are, except for their illegal entry, persons of good moral character and deserving of administrative discretion.

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[21] Ninth Proviso of §3, Immigration Act of 1917.

A number of administrative decisions extend the remedy to persons who entered illegally and even fraudulently.[23] If a fraudulent entry does not bar an individual from the remedy, the fact that the petitioner entered under a Ninth Proviso grant, yet did not comply with the terms of admission, certainly has no bearing on his eligibility for the remedy.

It is submitted that the history of §249 justifies a construction of the statute to the effect that the petitioner and persons like him come within its scope. The petitioner has been a law-abiding resident of the United States for 25 years, and deportation would create a great hardship. Moreover, it would make no sense, since his presence in the United States has been tolerated, if not welcomed for 25 years. It is submitted that Congressional action is not necessary for cases such as that of the petitioner, if the statute is interpreted in the humanitarian spirit in which Congress had enacted it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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January 1964

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[23] Gordon and Rosenfield, "Immigration Law and Procedure" (1959), p. 737, 1963 Supplement, p. 737, n. 49; Matter of S—, 8 I. and N. Dec. 288 (1959).

APPENDIX

Statutes Involved

Section 249 (8 U. S. C. 1259) as amended:

A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.

Sec. 101(a) 33 (8 U. S. C. 1101(a)(33)):

* * * * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352

of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.

Sec. 101(g) (8 U. S. C. 1101(g)):

For the purposes of this Act any alien ordered deported (whether before or after the enactment of this Act) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

Proof of Service

I, EDITH LOWENSTEIN, counsel for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of January, 1964, I served copies of the foregoing brief on the Solicitor General, Department of Justice, Washington 25, D. C., the attorney for the Respondent, P. A. Esperdy, District Director, Immigration & Naturalization Service, by mailing copies in duly addressed envelopes, with first-class postage prepaid.

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